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Edmund E. Greenwell v. R. C. Duvall : Brief of Respondent

Utah Supreme Court

Arthur H. Nielsen; Nielsen and Conder; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

EDMUND E. GREENWELL,
Plaintiff and Respondent,

— vs. —

R. C. DUVALL,
Defendant and Appellant.

Case
No. 8961

RESPONDENT'S BRIEF

ARTHUR H. NIELSEN
NIELSEN AND CONDER,
Attorneys for Respondent
510 Newhouse Building
Salt Lake City 11, Utah

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PRELIMINARY STATEMENT

Appellant has devoted considerable space in his brief to a statement of the background and facts in regard to the matter before the Court. In reading this statement, the Court may recall the case of *Douglas* v. *Duvall,* where the appeal was taken by the Plaintiff from an adverse ruling by a jury. The Court's decision is reported in 5 Utah 2d 429, 304 P. 2d 373. That case is related to this case in that they both involve the same Defendant and arise from the transactions relating to the financing of the operations of the Duvall Mine. There is, however, a marked difference in the two claims which, as the Court

will perceive, amply explains why the Plaintiff in the previous case may have lost while the Plaintiff in the instant case was successful. The Plaintiff Frank Douglas in the other case commenced making loans to the Duvall Company in the Spring of 1950, prior to the time the mine was put in operation. At that time the engineering reports, which the Defendant relied upon as showing his good faith and which he testified were shown to the Plaintiff Douglas, indicated the presence of 200,000 tons of "proven and probable ore reserves having values of about $7.00 per ton." The estimate given in the report for mining and milling costs totaled $3.28 per ton which on the basis of a 90% recovery would leave a profit of $3.02 per ton or $6,004.00 for the ore body investigated.

In its opinion the Court comments upon the jury's verdict as follows:

> "Significant facts which support such conclusion included an inspection by plaintiff, prior to any loan, of a competent engineer's report and map showing the mine's location, drilling data, estimated tonnage, production costs and ore values . . ."

The transaction in the instant matter, however, took place after three (3) years of unsuccessful operation of the mine — when all of the actual experience of those years repudiated the engineer's estimates given in January, 1950.

Defendant Duvall testified that upon receiving the engineering report from Roger Pierce in January 1950 (Defendant's Exhibit 2 in this case) it was determined

to incorporate and proceed to raise funds to build a mill and operate the mine (Tr. 89-91). The Articles of Incorporation (Plaintiff's Exhibit A) show that the Company was incorporated for $1,000,000, of which $700,000 was issued. The issued stock was given to the incorporators (consisting of Duvall, three members of his family, Fredrick Froerer and Lawrence S. Berrett) in exchange for the mining properties and the improvements or machinery located thereon. The Duvall interests received 55,000 shares of stock, having a par value of $550,000.

Following incorporation it was necessary to borrow money to build the mill (Tr. 23, 89). Initially, $100,000 (not $80,000 as stated in Appellant's Brief) was raised by borrowing from Frank Douglas and others, including Defendant Duvall and his associates Froerer and Berrett. (Exhibit R) Mr. Duvall testified that only $80,000 was borrowed (Tr. 91) but the actual records disclose otherwise (which only goes to reflect upon the accuracy of Appellant's testimony).

Although the Pierce report (Exhibit 2) further stated that "it is estimated that to build this plant and get it into operation approximately $100,000 will be needed," it turned out that the initial borrowings were inadequate so that in August, 1950, a so-called "assessment" was levied on each stockholder in proportion to his stock. (Tr. 142) Mr. Duvall, owning by far the greater portion of the stock, was assessed the greatest amount.

The mine and mill were operated from the first of September until December, 1950. Appellant states "the

recoveries made during the first year's operation were not good." This is indeed an understatement of the fact. Exhibit B discloses that for every ounce of gold recovered (worth $35 per ounce) it cost $108.71, without considering any depreciation on the mill and equipment which had been installed at a cost of approximately $120,000.

About December 14, 1950, Mr. Romney prepared a schedule of the mill tonnage and precipitate shipments for the year 1950 (Exhibit D). This was received by Mr. Duvall about that time (Tr. 25-27). From this Exhibit (as well as the verbal testimony of the various parties concerned with the operation of the mine) it appears that the average assay of the ore being mined was .15 ounces of gold per ton, which at the value of $35 per ounce would be approximately $5.25 per ton. However, only about 32.6% of the gold was being recovered so that approximately $1.95 was actually being recovered from each ton of ore mined (See also Exhibit Y). At the same time it cost $9.49 per ton to mine the ore so that the company suffered a loss of in excess of $7.50 for every ton mined (See Exhibit Y). This information was well known to Defendant, Duvall, who was kept informed from day to day and week to week as to what was taking place. (Tr 24, 31, 36) As stated by Mr. Roger Pierce, the engineer, "Certainly we bumped into troubles the first minute we turned the material over." (Tr. 281)

Because of the loss sustained during the 1950 operating season it was necessary to raise more money to

make changes in the operation and to continue with the operation. This was done by additional borrowings. As expressed by Mr. Duvall, "That's the only way we had of obtaining money." (Tr. 38) Following the close of operation, about December 1, 1950, until May 15, 1951, when the next year's operation commenced, $55,000 more was borrowed from various individuals. (Plaintiff's Exhibit R)

An income and expense statement prepared for the Company covering the period September 1, 1950, to March 31, 1951, discloses that the Company had a total operating loss of $54,039.79 (Plaintiff's Exhibit E). At that time the capital stock of $700,000 issued and outstanding was impaired by the amount of $54,039.79 and thus the Company was insolvent. (See Exhibit E) The records further reveal that the Company thereafter remained insolvent up until the time that operations were abandoned in the Fall of 1953. (See Exhibits E, K, P, T, and 13)

Although the per cent of recovery of gold from the ore was increased in the year 1951 from approximately 32% to 63% the over-all picture of the operation did not change to any degree. Exhibit F (which contains a summary of the mine operation) discloses that a total of 21,468 tons of ore were processed, averaging .164 ounces of gold per ton. Converted to dollar value, this would indicate that the ore being processed would average $5.74 per ton gold content. However, since only 62% of the gold was being recovered, the actual recovery from the ore processed was approximately $3.45 per ton (Exhibit

Y). At the same time the costs of operation, including depreciation and depletion, were $7.48 per ton, leaving a net loss of $4.03 for every ton mined in that year (Exhibit Y). According to the statement of profit and loss and balance sheet prepared for the company covering the period to September 30, 1951, the company had an operating loss of $28,477.92 up to that time without considering any depreciation or depletion. (Plaintiff's Exhibit K) This Exhibit further reflects the increased insolvency of the company.

Again at the end of the 1951 season it was necessary to look to further borrowing in order to have money to be prepared to operate in the 1952 season and to make such changes as they desired to make in the plant operation. As testified by Mr. Duvall there was no source of revenue other than what might come in from the gold or from the moneys which were borrowed (Tr. 39). For the period of operation in 1951 the company received $74,112.19 from gold recovery and the cost of operation (including depreciation and depletion) came to $160,570.33. The difference between these two figures had to be made up by borrowings according to Mr. Duvall (Tr. 39). Exhibit R discloses that it was apparently necessary at all times and continually after the company started operations on September 1, 1950, to engage in substantial borrowings. From May 15, 1951, until December 1, 1952, a total of $112,558.37 was borrowed, making a total borrowing of $167,558.37 after the completion of the plant in the Fall of 1950 and up to December 1, 1952.

Of this amount nothing was contributed or loaned by Mr. Duvall or his associates (Exhibit R).

The 1952 operation was little different from the operation in 1951. The per cent of recovery of gold from the ore remained about the same (62%). Since the ore assayed about the same as to its gold content, the proceeds per ton remained about the same. The only changes were in the cost of operation, which increased from $7.48 per ton to $7.98 per ton and the over-all production from the mine which increased from 21,468 tons to 27,000 tons so that the over-all loss increased substantially, as did the net loss per ton which increased from $4.03 to $4.30 per ton (Exhibit Y).

In 1952, a total of $99,539.71 was received from the sale of the gold recovered from the ore. At the same time it cost $215,444.54 for operation (including depreciation and depletion) leaving an operating loss for the period of approximately $115,000 (Exhibit Y). Again, Mr. Duvall testified that he was aware from week to week of the operations of the company during the 1952 season and of the reports showing the gold content of the ore being processed as well as the cost of the mining operations. (Tr. 39) Plaintiff's Exhibits M and O are interesting in that they disclose that during the years 1951 and 1952 there were daily plant reports prepared by the company superintendent and furnished to Duvall, which reports showed the assays of the ore being processed and the recovery therefrom. These reports were cumulative so that from month to month it was possible

to determine at a moment's glance the total amount of ore which had been processed up to that time, the assay content thereon, and the gold recovery therefrom.

At the end of the 1952 season, Mr. Duvall testified, it was necessary to engage in additional borrowings in order to put in some new tanks, engage in further stripping operations and for operation expenses generally. (Tr. 39, 40) Although Appellant states in his Brief (Page 5) that in the Fall of 1952 it was necessary to expend over $31,500 for the purchase and installation of three additional thickener tanks, the records of the company do not support that statement. According to the records of the company, as analyzed by an independent certified public accountant, Paul B. Tanner (Exhibit X) the only expense incurred by the company for additional plant equipment after October, 1952, was the sum of $525 paid for freight in the Spring of 1953. There was one payment of $5,000 in October which Mr. Tanner testified might have been used for the purchase of additional equipment. (Tr. 236-241)

From the foregoing it would appear that the financial situation of the company as of December 1, 1952, was rather critical. Apparently it was sufficiently serious that Mr. Duvall himself felt impelled to put an additional $5,000 into the company. This was the first money which he had advanced to the company after the original construction of the mill had been completed in the Fall of 1950 (Exhibit R). His advance was made on December 9, 1952, for which he received a promissory note. On the same date Francis Cave also loaned the company

$5,000. About this time, Mr. Duvall, who was only casually acquainted with the Plaintiff (Tr. 13), saw Plaintilff at the Weber Club and invited him to come to Defendant's office in the Ogden First Federal Savings and Loan Association to discuss a matter of business.

At the time of this transaction, he was president and general manager of the Ogden First Federal Savings and Loan, with which institution he had been associated for over 20 years. (Tr. 13) Defendant, prior to coming to Ogden and being involved in the Duvall mine operation, had ten years of experience in oil and gas exploration and development. (Tr. 15)

Mr. Duvall testified that when Plaintiff came into Defendant's office a few days later, Defendant asked the Plaintiff to make a loan to the Duvall Company. At that time Defendant testified he was not sure whether he knew Mr. Duvall had $5,000 on deposit with the Ogden First Federal. (Tr. 136). He later denied he knew of Mr. Greenwell's deposit with the Company. (Tr. 137) Plaintiff, however, testified that Mr. Duvall asked him to investment $5,000 in the company. (Tr. 173) This fact is particularly significant because at that time Mr. Greenwell had on deposit with the institution of which Mr. Duvall was president and general manager the sum of $5,000.

Mr. Duvall further testified that at the time Mr. Greenwell came into the bank to talk to him that he (Mr. Duvall) discussed the general operation of the mine with the Plaintiff. (Tr. 60) When asked if he made any state-

ment to him with respect to the amount of ore that had been blocked out, he testified that he showed Mr. Greenwell the report which had been made in January of 1950 by Mr. Pierce and showed him on the report what Mr. Pierce had stated with respect to this matter. (Tr. 60, 61) At that time the operating bills of the company were not paid but this fact was not disclosed to Plaintiff. (Tr. 63)

Following the discussion Mr. Greenwell agreed to loan the company $5,000 and gave his personal check therefor. (Tr. 211, Exhibit L) In turn, he received a promissory note on a form used by the Commercial Security Bank (in which company Duvall was a director). The Bank's name was crossed out and the name of the Plaintiff and his wife, as joint tenants with full right of survivorship, was filled in. This note is dated December 21, 1952, and is a demand note since no future date for payment is specified. (Exhibit M) Plaintiff was also given 500 shares of stock which was put in the name of Plaintiff and his wife as joint tenants with full right of survivorship (Exhibit V). At the time the loan was made the Duvall Company was hopelessly insolvent and unable to pay its bills except from additional borrowings which were made after Plaintiff's loan in the additional amount of approximately $30,000. (Exhibits R. T) At the time it ceased operation it owed substantial sums for unpaid bills in addition to the unpaid notes of $325,044.17 plus accrued interest. (Exhibits R., T)

During its 3 years of operation the company had mined 113,409 tons of ore assaying approximately $5.50 per ton, from which it had recovered gold at the rate of

approximately $3.10 per ton of ore for a total income from operations of $351,250.77. At the same time it had cost $732,754.51 for operations (which did not include the cost of the mill and other capital equipment but did include depreciation thereon of $90,545.37 and $18,590.23 for depletion). (Plaintiff's Exhibits T and Y, and Defendant's Exhibit 13)

POINTS RELIED UPON

Appellant has listed several points for consideration by this Court in seeking a reversal of the decision of the lower court. Inasmuch as each of these points has been separately argued in Appellant's Brief, Respondent will answer them in the same order, as follows:

I. Alleged error in permitting Plaintiff to amend his Complaint at the time of trial.

II. Alleged error in denying Defendant's motion to dismiss at the conclusion of Palintiff's evidence.

III. Alleged error in receiving the testimony of witnesses, Felt, Tansil, Douglas, Foulger and Shreeve.

IV. Alleged insufficiency of the evidence to sustain the Findings and Judgment.

V. Were the representations found to have been made actionable as a matter of law?

VI. Alleged insufficiency of the Findings of Fact.

VII. Alleged insufficiency on proof of damages to the Plaintiff.

ARGUMENT

I. ALLEGED ERROR IN PERMITTING PLAINTIFF TO AMEND HIS COMPLAINT AT THE TIME OF TRIAL.

The matter of the amendment to Plaintiff's Complaint was discussed by the Court and counsel at the beginning of the trial. At that time, as counsel for Plaintiff pointed out, the proposed amendment conformed to the amendments which were theretofore made in the Douglas Case and which amendments were well known to Defendant, thereby negativating any surprise on the part of the latter. As pointed out by Defendant's counsel at that time:

> "Now, this isn't a new proposition. We have considered this same matter in the previous Douglas case that has been tried and disposed of — and I might say that in that case the defect was cured by amendment, which has never been proposed in this case." (Tr. P. 3)

After the proposed amendments in the instant case were read to the court and discussed by counsel, the court made the following observation:

> THE COURT: Well, I don't think it could take you by surprise because the conversations you've had, and the recollection of those conversations, would be such that that is what is proof, after all is said and done, and the proof—
>
> MR. OLMSTEAD: The Douglas case was a completely different case than this.

THE COURT: Yes, but this case is based upon certain representations.

MR. OLMSTEAD: Certain alleged representations specified in the complaint—

THE COURT: Growing out of certain conversations at a certain time and certain place.

MR. OLMSTEAD: Right; and in his deposition he outlined what those representations were, and now this is a complete departure from that. (Further Argument on Motion)

THE COURT: Well, I'll overrude the objection and the amendment may be made to paragraph 4. I want it made in writing, though. I want it reduced to writing." (Tr. p. 7-8)

Following this discussion, counsel for Defendant did not make any claim that he was in any way prejudiced in preparing the case for trial or that by reason of the amendments being made he would not be able to proceed with the trial of the case. On the contrary, the facts disclose that he had at all times been aware that technical amendments made in the Douglas case would of necessity be made likewise in the instant matter and if the case had been pre-tried by the court there is no doubt that such amendments would have been proposed and made at that time.

Rule 15 (a) U.R.C.P. provides:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial cal-

endar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." (Emphasis added)

See *Davis Stock Company* v. *Hill,* 2 Utah 2d 20, 268 P. 2d 988, where this Court indicated the liberal nature of this rule at the same time outlining the essential elements which have to be pleaded in a fraud case.

In view of these facts, we respectfully submit that the trial court did not err in granting Plaintiff's motion to amend.

II. ALLEGED ERROR IN DENYING DEFENDANT'S MOTION TO DISMISS AT THE CONCLUSION OF PLAINTIFF'S EVIDENCE.

As stated by Appellant in this case, Plaintiff's theory is that he was induced by false and fraudulent representations of the Defendant to make a loan of $5,000 to the Duvall Company. Appellant in his brief concedes that the loan was made by Respondent and the record is clear that the check (Exhibit L) was drawn on Respondent's personal account (Tr. 211). Nowhere is it argued that Plaintiff's wife made the loan or had anything to do with it. Appellant urges, however, that since the note was made

payable to Plaintiff and Plaintiff's wife "as joint tenants, with full rights of survivorship, and not as tenants in common" that Plaintiff is not the proper party to bring this action.

The law on this point is well stated in 23 Am Jur *Fraud and Deceit,* Section 181, page 1000:

> "The question as to who may complain of fraud, other elements existing, is determined by the real interest of the parties. Thus, the right of one who trades property for corporate stock to recover for false representations by the owners of the stock to recover for false representations by the owners of the stock as to the amount of the corporate property is not affected by the fact that some of the stock is taken in the names of other persons by his direction."

The case of *Boddy v. Henry et al.,* 85 N.W. 771, which is cited as authority for this statement, involved a situation where the plaintiff had traded some of his real property to defendants in exchange for corporate stock. When plaintiff took the stock from defendants, he had some of it made out in the names of members of his family. In answer to the defendant's contentions that plaintiff should not be allowed to recover damages as to this stock, the court had this to say at page 774:

> "Some of the stock acquired by the plaintiff in this transaction was taken in the names of members of his family, and defendants complain that plaintiff was not entitled to recover damages for depreciation in the value of such shares, due to misrepresentations as to the quantity of land. But we do not concur in this view. The entire body of stock

transferred by defendants was so transferred in consideration of the exchange of plaintiff's property, and his right to recover for any deficiency in the value of such stock due to misrepresentations would not be affected by the fact that some of the stock thus acquired by him was, by his directions, put into the hands of others."

The present case involves an identical situation. Respondent here made the loan with his personal check. The fact that the note was thereafter made out in the name of Respondent and his wife should not defeat his right to recover for the damage sustained.

The Supreme Court of Massachusetts when faced with a similar situation made a ruling to the same effect. See the very recent case of *Sandler* v. *Elliot* (1957), 141 N.E. 2d 367. This case involved the purchase of a franchise by two brothers. One of the brothers subsequently commenced an action to recover the damages he had suffered as a result of alleged fraud by the seller. Both brothers did not join as plaintiffs. In fact, at no place in the pleadings did it appear that the contract involved more than the sellers and the plaintiff. The defendants upon appeal argued that this defect was fatal. The court, however, did not agree and held the following: (p. 372)

"The omission to allege, or, through references to the contract, show, that the brother was a 'purchaser' under it does not make the cause different from that proved. The suit is not for damage to joint property (the contract) or for joint loss or for the brother's loss; it is for the for loss caused to this plaintiff only. The brother is not concerned

in the cause of action for that separate tort. Baker v. Jewell, 6 Mass. 460, 462. See Thompson v. Pentecost, 210 Mass. 223, 228, 96 N.E. 335. Compare Medbury v. Watson, 6 Metc. 246, 257. The plaintiff, as alleged, did 'buy * * * the franchise'; that the brother had become a 'purchaser' also in order to assume obligations to the corporation under the contract, did not make this legally untrue even if the brother also had acquired a legal title to the franchise. If the evidence supporting the view that the plaintiff had the sole beneficial interest is accepted, it was a substantively correct allegation as a matter of fact without qualification."

Appellant quotes the provisions of Rule 19 (a) and (b), U.R.C.P., but ignores the provisions of Rule 17 (a) which provides:

> "Every action shall be prosecuted in the name of the real party in interest; but . . . a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought . . ."

In this case the transaction took place between Plaintiff and Defendant. The representations were made to Plaintiff and induced him to make the loan. The tort was committed against Plaintiff and Plaintiff was damaged by being induced to loan his money. If, however, the transaction was conducted on behalf of Plaintiff and his wife, then under the Rule above quoted the party with whom the contract was made (Plaintiff) for the benefit of another (himself and wife) "may sue in his own name without joining with him the party for whose benefit the

action is brought." It must, however, be remembered that this is not an action on the note, but for damages for false and fraudulent representations made to Plaintiff inducing him to make a loan of $5,000 to the Duvall Company.

III. ALLEGED ERROR IN RECEIVING THE TESTIMONY OF WITNESSES, FELT, TANSIL, DOUGLAS, FOULGER AND SHREEVE.

In the course of the extensive borrowings which it was necessary to make during the years the company was in operation, Appellant Duvall had repeated conversations with various other individuals who were induced to make loans to the company. Several of these individuals appeared as witnesses in the Douglas Case as well as in the instant matter. In offering first the testimony of the witness R. D. Tansil (Tr. 213), counsel for Respondent submitted to the Court that the evidence was admissible under the law as stated by McCormick on Evidence, 1954 Edition, Section 164, as follows:

> "The policy against proving other misconduct of a party for the sole purpose of evidencing his character or disposition as raising the inference that he was probably guilty of the misconduct charged in the suit, finds expression in civil as well as in criminal cases. Where redress for fraud or misrepresentation is sought, three alternative theories may be available to support the admission of evidence of other misrepresentations or fraudulent conduct by the party.
>
> 1. When under the applicable substantive law, knowledge or intent by such party is an essen-

tial ingredient for liability, then if it be proved that the party has made other misrepresentations, of similar purport, and false in fact, this tends to show that the representations in suit were made with *knowledge* of their falsity and with *intent* to deceive. This inference does not require that the other representations should have been identical in purport nor made under precisely like circumstances. Only a reasonable approximation in purport, time and circumstance is needed to ground the inference of knowledge or intent.

2. If the actual making of the misrepresentations charged in the suit is at issue, then to show the party's *conduct* in making the representations or committing the other acts of fraud as alleged, it is competent to prove other representations closely similar in purport or other fraudulent acts, when they may be found to be parts of a large or continuing *plan* or *design,* of which the acts or misrepresentations in suit may also be found to be an intended part or object. Similarly, it would seem that if the identity of the perpetrator of the fraud in suit were in doubt, then other fraudulent acts of the party so like the conduct in suit as to earmark them as the product of the same mind and hand, would be received to show that he was the perpetrator.

3. The courts have not generally gone so far, but it is believed that the admission of evidence of previous similar misrepresentations to show the making of the present representations should, in civil cases at least, be extended to cover the situation where there is testimony asserting the making of the misrepresentation at issue, and testimony denying it. Here it seems that evidence in reply of other like misrepresentations by the party (whether or not part of a plan or scheme) will be

of much value to the trier upon the disputed question and that this need outweighs the danger of prejudice. While such evidence standing alone would not of course be sufficient to establish the issue, it can be of great value in resolving the conflict." (Emphasis added)

While the Court did not agree with counsel as to the third ground for admission quoted above, it did admit the evidence of these witnesses as to similar statements made to them on other occasions for the purpose of showing knowledge, intent and motive, as well as indicating a continuing plan or scheme. The fact that the statements were made to the witnesses at varying times within 8 to 18 months of the time of the transactions involved with Respondent does not make the testimony inadmissible, but goes more to the weight to be given thereto. As stated in 20 Am. Jur. EVIDENCE, Section 339 P. 315:

> "It is a common inquiry upon the trial whether a person made a certain statement or committed a specific act upon a named occasion. *It is generally held, in this connection, that proof is admissible to show that a person said or did something of the same sort on a different occasion, provided it shows the existence of intention, knowledge, or bad faith upon the occasion in question.* Thus, similar fraudulent acts or representations are admissible if committed at or about the same time as the one in question and if the same motive may reasonably be presumed to have existed, with a view to establish the intent of the defendant in respect of the matter charged against him. Unless, however, such collateral acts are shown to be so connected with the matter in litigation as to make it apparent that the party to be charged had a common pur-

pose in both, they are inadmissible. Collateral proof of knowledge or intention must be limited to a certain period so that it may naturally throw light upon the intent with which the act in question was committed. *The question of the period of time during which other acts may be proved is largely a matter within the discretion of the trial court.*'' (Emphasis supplied)

Appellant recognizes the previous pronouncement by this Court as contained in *Trout and Resort Company* v. *Lewis,* 41 Utah 183, 125 P. 687, and *Smith* v. *Gilbert,* 49 Utah 510, 164 P. 1026. In the latter case the Court discussed the former decision and made the following determination:

> ''The District Court, in ruling upon the admission of evidence, attempted to be governed by the rule laid down by this court in the case of *Trout and Resort Co.* v. *Lewis,* 41 Utah 183, 125 Pac. 687, where the rule is stated in the tenth headnote in the following words:
>
> > '' 'False representations, similar to the ones involved in an action, are admissible where the intent, motive, or knowledge of their falsity by the party making them are material, or where it is sought to prove a system or general plan or scheme to defraud.'
>
> ''The court thus permitted appellant to prove by other witnesses to whom the plaintiff had sold some of the capital stock of said corporations about the time the appellant purchased the stock in question that the plaintiff had made representations and statements to them to the same effect as those which appellant testified were made to him concerning the stock.''

Appellant argues that the testimony of the other witnesses as to statements made to them on other occasions by the defendant was inadmissible because there was no proof that such representations were false. In urging this position Appellant ignores not only the testimony of Plaintiff's witnesses but the testimony of Defendant's witnesses, including Defendant himself. The same evidence which supports the claim of Plaintiff that the representations made to him were false also supports the fact that the same, or similar, representations made to the witnesses Felt, Tansil, Douglas, Foulger, and Shreeve were false.

The case of *Menefee* v. *Blitz,* 181 Or. 100, 179 P. 2d 550, (cited by Appellant) is clearly not in point. There the court pointed out that motive and intent were not in issue in the case so that statements made to third persons would not be admissible to prove the same. In the instant case every allegation of the complaint with respect to the elements of fraud was denied and put in issue by the Defendant, including knowledge, intent, and motive (whether Defendant made the statements for the purpose of inducing Plaintiff to rely thereon).

The evidence was clearly admissible for the purposes indicated by the trial court in allowing it to come in.

IV. ALLEGED INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE FINDINGS AND JUDGMENT.

V. WERE THE REPRESENTATIONS FOUND TO HAVE BEEN MADE ACTIONABLE AS A MATTER OF LAW.

Points 4 and 5 are presented together because they involve substantially the same problem, to wit: whether the evidence is sufficient in fact or in law. Respondent agrees with the statement of law quoted by Appellant from the case of *Paulson* v. *Coombs,* 123 Utah 49, 253 P. 2d 621, as follows: (Appellant's Brief, p. 26)

> "The question of whether evidence is sufficient to be clear and convincing is primarily for the trial court; *his finding should not be disturbed unless we must say as a matter of law that no one could reasonably find the evidence to be clear and convincing.*" (Emphasis supplied)

This Court reached the same conclusion in affirming the verdict of the jury in the Douglas Case, supra, stating:

> "The factual scene here, as reflected in the record, required submission of the case to the jury, there being sufficient substantial competent evidence which, if believed, would sustain the verdict and preclude us from disturbing it."

Appellant argues that Plaintiff's testimony was inconsistent. We submit that it was not. For instance, Plaintiff testified on direct examination that "He also told me that the bills were paid and that things were in fine condition." (Tr. 174)

When asked about the same matter on cross-examination he testified:

"Q Did you know that the company had a then outstanding indebtedness?

"A I did not.

"Q Do you now say that Mr. Duvall said to you, in substance and effect, that as of that time, all of the bills were paid?

"A He did.

"Q And the company was in fine condition?

"A That is correct." (Tr. 186)

Plaintiff was then asked about astatement made in his deposition which counsel apparently thought was in conflict with his present testimony. In answer to counsel's inquiry, Plaintiff testified further:

"A I did not know there was any outstanding bills. I knew nothing about the condition of the company; only what Duvall told me." Tr. 187)

* * * * *

"Q Then, your answer as I have read it to you, 'I preseumed there was,' was a false answer? Is that correct?

"A The only way it could be false to me would be, if those tanks were on the property, which I did not know; or were in transit or were contemplated. Then, I would not know, because he asked me for the money for the cost of the tanks."

We believe the foregoing points out the firmness with which Plaintiff testified. While Plaintiff testified, as above indicated, that Defendant had represented to him that a loan was necessary in order to purchase certain tanks to

increase production at the mine, the record discloses that the money was not used for that purpose since no tanks or other equipment were purchased or paid for then or later. (Exhibit X) Appellant testified that "It was used to pay for material, or operating costs; was put in the general fund of the Duvall Company." (Tr. 127) However, he also testified that he told Plaintiff "that the shortage of money at the present time was partly occasioned by the fact that we needed to put in those new tanks to improve the recovery." (Tr. 140) We submit that it was Appellant who shifted his testimony. In fact, he repeatedly avoided answering questions directly, whether the questions were put to him by his own counsel or by counsel for Plaintiff.

We submit the evidence is sufficient to justify the Findings and Judgment of the trial court. The representations found by the Court to have been made are set out in the Findings (R. 27) and quoted by Appellant on page 30 of his brief. Appellant claims that the representations found by the court to have been made are not actionable. Several Utah cases are cited and quoted from in connection with Appellant's discussion on this point. However, those cases do not support Appellant's position but are either distinguishable on the facts or state the law to be as contended for by Respondent herein. We desire to discuss the various authorities for the benefit of the Court.

This Court has on numerous occasions outlined the basic elements of fraud. See *Stuck* v. *Delta Land and Wa-*

ter Company, 63 Utah 495, 227 Pac. 791. The question usually arises whether the misrepresentations are statements of fact or mere conclusions, the general rule being that in order for a matter to be regarded as a statement of fact it must have been susceptible to actual knowledge, it must have been made unqualifiedly, and it must have been false. The leading Utah case on what constitutes statements of fact as distinguished from matters of opinion is *Campbell* v. *Zion's Co-op Home Building and Real Estate Company,* 46 Utah 1, 148 P. 401, wherein the Court held that statements such as "that investors will get handsome returns" and "that their investments will be safe," were, under the facts of that case, mere opinions of trade talk and were not actionable in and of themselves. However, the Court went on to sustain a judgment for the Plaintiffs because, as it held, there were several statements made by the Defendants which were not mere opinions, but were actionable. We quote from the opinion at p. 407:

> "Such representations, and the statements made by the defendant's president and secretary that the dividends had been earned and were justified, relate to material and existing or past facts . . .
>
> ". . . But the most important statements to these plaintiffs are those that the defendant had on hand sufficient money, property, or assets with which to pay 8 per cent dividends from the start, and from three to five years, without 'hurting the financial standing of the company,' and though 'it did not earn another cent,' and those guaranteeing a present ability to pay dividends . . . On the record, we do not find anything to justify even the

statements made to the plaintiffs purchasing stock prior to the 'big dividends.' "

Other Utah cases which have discussed the matter are:

Hecht v. *Metzler,* 14 Utah 408, 417-18, 48 Pac. 37, wherein the court said in speaking to this problem of opinion:

> "As a general rule, actionable fraud or misrepresentation consists in a false statement concerning a fact material to the contract, and which is influential in producing it. Mere statements of value, made by a vendor, during negotiations between the parties, although known to be excessive, do not ordinarily constitute either a warranty or a fraud, unless the peculiar relation of confidence and trust existing between the parties is such that the person making the false representations had reason to believe that the other would rely and act upon them."

(The court clearly held that in a situation where a relationship of confidence existed, the statement as to value would be actionable fraud.)

In *Stuck* v. *Delta Land and Water Co.,* 63 Utah 495, 227 P. 791, the court held that where there was a question as to whether a represenattion was fact or opinion, the jury should determine the issue. After finding that some of the alleged statements involved were matters of opinion, the court went on to state:

> "However, there is at least one statement in the circulars that purports on its face to be a rep-

resentation of fact. It represents Pahvant Valley to be 'a thoroughly proven general farming district' . . . Just what was meant by a 'thoroughly proven general farming district' is somewhat indefinite, especially as to the nature and character of the proof . . . Whether or not it was a representation of an existing fact upon which the plaintiffs were entitled to rely was, under all the circumstances, a question for the jury to determine."

A recent case on the subject is *Pace* v. *Parrish*, 122 Utah 141, 247 P. 2d 273, wherein plaintiffs sued for damages for false representations concerning the extent and condition of certain farming land. In affirming the judgment, except for one item, this Court held:

> "With respect to the misrepresentation as to the condition of the fences: Plaintiffs' evidence was that the defendant told them that the property was fenced and cross-fenced with good fences; that this was not true; that some of the fences were in bad disrepair and in fact in places completely down. These places were remote from the area inspected and because of the difficulties above mentioned in getting around, we will not disturb the jury's finding that this misrepresentation was false; that the plaintiffs were reasonably entitled to rely upon it, and accordingly sustain the item of $100.00 awarded for such defective fences."

The defendant, Joseph A. Parrish, made certain representations to the effect that a reservoir was upon the property being sold. He did not state that it was owned by sellers, according to his testimony, but plaintiffs claimed that he did so represent. The court further held:

"These representations concerning the reservoir could very well be interpreted to mean that the defendant owned the reservoir and all of the water in it and that it went with the place. The Paces could reasonably rely on these representations, as they did. The fact is that, although the reservoir was situated within the outside perimeter of the defendants' farm, both the reservoir and the land it was on belonged to the Northwest Irrigation Company, and the defendants were entitled to only one-fourth of the water. Defendants do not claim that plaintiffs knew or were advised of this fact but Mr. Parrish testified: 'If they had asked me, I would have told them.'

"Defendants suggest that the plaintiffs had no right to rely on the representations made by defendant, but were found to make more careful and complete inquiry concerning such matters. It is strange and inconsistent for defendants to urge the necessity for the plaintiffs to cross-examine Mr. Parrish and to doubt and verify his representations.

"As to reliance in such situations, see 5 Williston on Contracts, Rev. Ed., Sec. 1512. The full measure of the plaintiffs' duty was to use reasonable care and observation in connection with these representations. Having done so, it does not lie in defendant's mouth to say that they were too gullible and shouldn't have believed him."

See *Baird* v. *Eflow Investment Co., et al.,* 76 Utah 232, 289 Pac. 112 (1930), where the Court found that defendants had not been guilty of fraud but repeated the rule that although statements as to value are generally to be considered as opinions, a statement which is made

under circumstances such as exist in the present case, it is actionable. We quote:

> "It is the general rule that misrepresentations as to value do not ordinarily constitute fraud, as they are regarded as mere expressions of opinion or 'trader's talk' involving matter of judgment and estimation as to which me nmay differ. 26 C. J. 1215. . . . *For such misrepresentations to be* actionable they must be coupled with concealment of material facts or with artifice or misrepresentation used to prevent the hearer from learning the truth, or be made under such circumstances as to indicate that the hearer will rely on them, as where the truth of the speaker's statement is a controlling element of the transaction, or because confidential relations exist. But here nothing of the kind appears to take the case out of the operation of the general rule respecting such representations." (Emphasis supplied)

In *Beaver Drug Co.* v. *Hatch.* 61 Utah 597, 217 Pac. 695, the court held that a statement to the effect that the value of an inventory was $4,000 and that the Defendant would guarantee the same was not an expression of opinion but would support an action in fraud. We quote from the opinion at 217 Pac. 697:

> "It is contended by appellant that whatever representations were made as to value, if any, were mere expressions of opinion, and he cites Mechem on Sales, paragraph 936, in which it is stated that where parties deal at arm's length and on an equal footing, representations concerning the worth or value of the goods sold will neither sustain an action nor warrant rescission. This doctrine is unchallenged. However, it has no applica-

tion in the instant case. The representation as to the price of the goods was not a mere expression of opinion, but a statement of fact. The statement was that the goods would inventory $4,000 and the defendant would guarantee the same. The inventory was to be made within 60 days from the date of the sale and be made by the Smith-Faus Drug Co. of Salt Lake City. It was so made and found to be $1,165.41 less than represented by defendant during negotiation of the sale. . . ."

The recent case of *Lewis* v. *White,* 2 Utah 2d 101, 269 P. 2d 865 (1954) involved a situation where a widow and her daughter purchased a motel on contract from plaintiff, a real estate broker, and motel operator, and attempted unsuccessfully to operate it. When the purchasers became delinquent in their payments, Plaintiff, seller, sued to recover possession of the motel; and defendants counterclaimed for damages, alleging among other things that the plaintiff had represented the income of the property to be $1,000.00 per month whereas in fact it was only $225.00 This Court reversed the decision of the trial court in favor of the defendant because the trial court had failed properly to instruct the jury on the matter of reliance on the representations which plaintiff had made. In doing so, however, the Court made some very important statements, as follows:

> "It is of course true that it must be assumed that a seller will represent his property at least in its best light. A certain amount of sales talk or "puffing' must be taken into account and allowed for so long as it does not amount to active deception or concealment. *On the other hand, the wide difference in experience and business acumen,*

and the degree to which Mrs. White placed confidence in Mr. Lewis and relied upon his representations are things which the jury could take into consideration on the question of fraud. The evidence being conflicting on these matters, the trial court correctly ruled that it was sufficient to warrant submission of the issue of fraud to the jury." (Emphasis supplied)

In *Mayer* v. *Rankin,* 91 Utah 193, 63 P. 2d 611, the court held that certain stock being sold was treasury stock of the company, that it was registered and was going to be sold on Monday to an individual in New York, when in truth and in fact it was seller's stock, was a sufficient representation which if made would be actionable.

In *Ackerman* v. *Bramwell Inv. Co.,* 80 Utah 52, 12 P. 2d 623 (1932), the Court found no fraud on the part of the defendant but in doing so relied to a considerable extent on the fact that there was no relationship between the parties which entitled Plaintiff to rely upon the statement made to him. The court said:

> "The representations that the note was 'as good as gold,' and that the investment company would see that the plaintiff 'did not lose a penny,' in and of themselves; are matters of mere opinion, exaggerated statements, and trade talk, and not actionable. *So far as made to appear, the plaintiff and the investment company dealt at arm's length with equal means of knowledge, dealing with each other on equal terms and free from and uninfluenced by any fiduciary or trust relation.* Before the plaintiff purchased the note, she interviewed the Whites with respect to it. Up to the time of the purchase of the note, the Whites

had kept up their payments on the contract, and that she was satisfied with their ability to pay the note. Not anything is shown or made to appear, nor is there any claim made, that the plaintiff had not equal means with the investment company to find out the financial responsibility of the Whites, nor is it shown or made to appear or any claim made that there was anything with respect to their financial responsibility or inability to pay the note which was peculiarly within the knowledge of the investment company and not of the plaintiff, or that any such matter was withheld from the plaintiff by the company." (Emphasis supplied)

In the instant matter the Plaintiff testified not only that he placed confidence in the defendant, who was the president and manager of a savings and loan institution, but actually asked Defendant's advice as a financial adviser and stated to Defendant, Plaintiff was willing to act upon such advice. (Tr. 174, 176, 186)

In addition to the foregoing cases decided by our own Supreme Court, there is considerable other authority on the matter which we feel supports Respondent's position. In 23 Am. Jur., FRAUD AND DECEIT, Section 28, page 785, appears the following:

"The distinction between fact and opinion is broadly indicated by the generalization that what was susceptible of exact knowledge when the statement was made is usually considered as matter of fact. Representations in regard to matters not susceptible of personal knowledge are generally to be regarded as mere expressions of opinion, al-

though they are made positively and as of the maker's own knowledge. Usually, also, to say that a thing is only matter of opinion imports that it is unsusceptible of proof. *The mere fact that a statement takes the form of an expression of opinion, however, is not always conclusive. A statement may be so expressed as to bind the person making it to its truth, although stated in the form of an opinion, and conversely, that a matter which necessarily rests in opinion is stated positively does not make it a statement of fact.*" (Emphasis supplied)

In an annotation in 51 A.L.R. at Page 94 appears the following statement:

"The doctrine that fraud cannot ordinarily be predicated on unfulfilled promises or statements as to future events has been applied, or at least recognized as applicable, in various cases where the representation was as to the profits or amount of sales which the other party would make if he entered into the contract in question. It seems that the rule is especially applicable to this class of cases, since a statement as to future profits necessarily involves many elements of uncertainty, and should in ordinary cases be regarded as a mere expression of opinion on part of the person making it. *But it also seems that the misrepresentations may easily amount in such cases to misstatements of fact, and that fraud may be predicated on a statement regarding future profits, if the person making it has no reasonable grounds on which to base it, and has no honest belief in its truth, but makes the statement merely for the purpose of misleading and defrauding the other party;* as, where a business sold is being conducted at a loss, and the positive assertion is made by the seller to the purchaser, to induce the purchase, that

the latter will receive large profits therefrom. This may be construed as a misrepresentation of existing conditions." (Emphasis supplied)

In a later annotation (27 A.L.R. 2d at page 38) appears the following:

> 'A vague statement that a property or business is 'profitable,' or a 'money-maker,' or the like, may sometimes be treated as one of fact.
>
> "For example, a statement by the owner and operator of a resort hotel to a prospective purchaser that he is making 'good money' in the business, whereas he has never made a profit in any season, cannot be regarded as 'mere puff talk' of an enthusiastic salesman but is a statement of fact by one who knows the facts to one to whom the facts are not readily available. Spies v. Brandt (1950) 230 Minn. 247, 41 NW2d 561, 27 A.L.R. 2d 1, wherein there were more specific statements as to past and future profits.
>
> "A representation that a new corporation 'is a good paying proposition and a good going concern' was held to be fraudulent in Community State Bank v. Day (1923) 126 Wash. 687, 219 P. 43, where made by the cashier of a bank to induce plaintiff to buy stock, it appearing that the cashier then knew that the corporation had mortgaged all its assets to the bank only a few days before and that the corporation was not making money and was not paying its bills in the ordinary course of business.
>
> "In Sherman v. Smith (1918) 185 Iowa 654, 169 N.W. 216, the court held that statements that a corporation was doing a good business and was making money and that the builder of the business had a fine business and was doing well therein,

being made to induce plaintiff to buy stock in the corporation, could not be classed as nonactionable opinions if the speaker knew that the corporation had been doing business at a loss, was largely in debt, and had been compelled to borrow money to pay its debts and running expenses.

"A representation that a mining lease was 'paying expenses' was held to be one of fact in Beard v. Bliley (1893) 3 Colo. App. 479, 34 P. 271."

The courts have also held that matters which are generally considered opinionative statements may nevertheless be fraudulent under facts similar to the present case in establishing fraud found in Paragraph 4 (B) and (D) of the Findings (R. 27). See 23 Am. Jur., FRAUD AND DECEIT, Sec. 29:

"There are many qualifications and modifications of the rule that actionable fraud cannot be based upon the mere expression of an opinion. Frequently, even a false assertion of an opinion will amount to a fraud, where under the circumstances the other party has a right to rely upon what is stated or represented. Thus, an expression of opinion may amount to fraud where it is a mere contrivance of fraud, where the person to whom it was expressed has justly relied upon it and been misled, or where it is coupled with other circumstances, as where it is accompanied by active fraud or concealment.

". . . Moreover, where a speaker asserts as a fact something which forms material inducement for a transaction, he cannot complain, if his assertion is treated as factual matter, although if expressed as an opinion it would not be actionable. If a vendee relies on the representations of the vendor and acts upon the faith thereof, without

relying on his own judgment or opinion, and this is known to the vendor, the latter cannot shelter himself under the pretense that his representation was a mere expression of opinion, when it is discovered to be false.

"Where a statement consists in part of opinionative matter and in part of factual matter, although the whole statement formed the inducement to engage in the transaction, a charge of fraud is maintainable if the factual part was false to the knowledge of the speaker, or the whole was a comingling of fiction and opinion expressed with the intent of deceiving. A statement which by itself might be a mere expression of opinion may be so connected with a statement of a material fact as to amount to fraud. In other words, it has been held that the rule that no one is liable for an expression of an opinion is applicable only when the opinion stands by itself as a distinct thing, and is intended to be taken as distinct from anything else."

Also:

"It is settled that an expression of opinion may, under many circumstances, amount to fraud where there is a relation of trust and confidence between the parties. A fidiciary relationship between the parties imposes upon the one who is trusted a duty not only to state truly all matters, whether of fact or of opinion, but *also to disclose all material facts* and even his opinion as to the present or prospective value of the subject matter, etc.

"In order to hold one liable for fraud for the expression of an opinion, the relationship between the parties need not be a formal fiduciary or confidential one in all instances, such as the relation-

ship of trustee and cestui que trust. It is sufficient that the representor had superior knowledge, *and knew that the representee confided in him and was guided by his opinion.* Even matters of opinion may amount to affirmation, and be the inducement to a contract, especially where the parties are not dealing on equal terms, and one of them has, or is presumed to have, means of information not equally open to the other. Hence, the rule is that if the person expressing the opinion possesses superior knowledge, and it is a justifiable conclusion that he intended untruly to imply that he knew facts such as would justify his opinion, his opinion may be regarded in law as an assertion of fact and not honestly entertained." (Ibid Sec. 30)

While the areas of fact and opinion are not clearly delineated, it does seem clear that where there is a fair question as to which a statement is, the matter must be submitted to the jury as a question of fact. See 24 Am. Jur., FRAUD AND DECEIT, Section 293:

> "A statement may be so clearly the expression merely of the opinion of the person making it not to be relied upon as a representation of fact that it may be held as a matter of law not actionable as a false representation constituting a fraud. Thus, it has been held error to submit to the jury the question wherther a representation by the vendor of lands that they contained large deposits of oil was understood as a matter of opinion or a representation of a fact as within the vendor's knowlege, *where the land had never been tested and the matter therefore necessarily rested in opinion.* It is, however, often impossible to state as a matter of law whether a statement is an expression of the opinion of the speaker or a representation of fact

to be relied upon as made within his knowledge, and when such is the case, the question is one of fact . . .'' (Emphasis supplied)

See also *Baird* v. *Eflow Investment Co., et al., supra.*

In the case of *J. C. Miller Estate, Inc.* v. *Drury,* 120 Wash. 694, 208 P. 77, it was held that representations that bank stock was of the value of $125.00 per share and was earning a 10 per cent dividend, and that the bank was in a prosperous condition, when in fact the dividends had been paid out of capital and the bank failed four months after the transactions, were material in establishing fraud.

Appellant in his argument has attempted to minimize the effect of the several representations made by him by isolating each and asserting that standing alone such representation is not sufficient. In the first place, we do not agree that any representation is inadequate on which to base a finding for Plaintiff but in any event the representations in this case are interrelated. The statement that 300,000 tons of ore were blocked out is not only a material false representation itself but gives more body or substance to the representations that the mine was worth more than $2,000,000.00 and therefore an offer for that amount had been refused.

Although Appellant seems to have trouble with the phrase ''fine condition'' as used in Finding No. 4 (C) no snch question existed in the mind of Appellant's witness Pierce who was asked on cross-examination:

"Q However, you would not state that in each one of these years, 1950, 1951, or 1952 that the mine was in fine condition and working fine, would you?

"A The plant never worked fine.

"Q And in 1950, after the plant got into operation, and in 1951 and 1952, you would not be in a position to state that the uplant was ever paying its bills from the income it was receiving from the operation, would you?

"A No, no one asked me; no one asked me if the mine was running fine, or if the plant was running fine.

"Q When you say 'no one asked you,' what—

"A I mean other than those who were in the actual operation — Mr. Romney, Mr. Duvall —of course, we could see. I knew from the trouble we were having with the plant, that it was not running fine.

"Q And when you say it was not running fine, you discussed this with Mr. Duvall so that he knew it was not?

"A Certainly he knew." (Tr. 290)

This Court, in *Kinnear, et al.* v. *Prows,* 81 Utah 135, 16 P. 2d 1094, held that the alleged representation that, ". . . stock paid dividends of 10 per cent annually was such a material representation which, if false and relied on, would support an action for fraud." The court also went on to hold that a representation to the effect that stock was not assessable when in truth and in fact it was would be be material and would support an action in fraud.

In *De Frees* v. *Carr,* 8 Utah 488, 33 Pac. 217, the court held that a representation by the defendant that a company had made $5,659.70 profits during a certain period and that plaintiff's share of this amount would be $943.28, when in truth and in fact the company was insolvent, were material and relief should be granted even though the plaintiff might have informed himself as to the facts but did not.

VI. ALLEGED INSUFFICIENCY OF THE FINDINGS OF FACT.

Appellant complains that the trial court did not make adequate and sufficient findings. While the trial court must make findings upon all material issues raised by the pleadings, there is no requirement that the court make any findings on matters not raised by the issues and not in dispute during the trial. First, as stated by Appellant the uncontradicted evidence disclosed that the company discontinued operations after mining only 113,000 tons of ore. This was one of the points used by Plaintiff—not Appellant—to establish that the representation that 300,000 tons of ore was blocked out was false. In other words, the fact that only 113,000 tons of ore was mined indicated that not in excess of that amount had ever been blocked out and that the Defendant was aware of the extent of the ore body sufficiently so that he could not in good faith represent that 300,000 tons of ore had been blocked out. It was unnecessary for the court to make the specific determination that only 113,000 tons of ore had been mined because the court

found that the representation that 300,000 tons of ore had been blocked out was in fact false.

Second, Plaintiff claimed that Defendant represented that there had been 300,000 tons of ore blocked out "ranging in value from $4.20 per ton to $50.00 per ton and that said ore averaged not less than $7.00 per ton, when in truth and in fact, said Defendant well knew that the diamond drilling of said property had not resulted in finding ore of commercial value, and that in no event had more than 200,00 tons of proven and probable ore been blocked out." (R. 16) The Court, in finding the representation to have been made in respect to this matter, found that Defendant represented "that said Duvall Mining Company had, as a result of diamond drilling and tunnelling, blocked out 300,000 tons of ore containing gold ranging in value from $4.20 per ton and less, to as high as $50.00 per ton when in truth and in fact Defendant well knew that only 200,000 tons of proven and probable ore had been blocked out." (R. 27) While the Court did not find the representation to have been made exactly as it was alleged in the complaint, nor did the court find that all of the representation made was false it nevertheless does not follow that the Finding is defective in this respect. If anyone were entitled to complain of such Finding it would be the Plaintiff since the Court might well have found that the ore blocked out was not of commercial value in the light of the testimony which showed that the average assay of the ore was approximately $5.50 per ton while the cost of mining the same was in excess of $7.00 per ton. Certainly ore

which is of less value than the cost of mining the same is not commercial ore.

Again, Appellant complains because the Court did not make any finding in respect to what happened in so far as replacing the money which Plaintiff had used to make the initial loan to the Duvall Company. According to the testimony, Plaintiff issued to the Duvall Company his personal check in the amount of $5,000.00 Approximately six months later he withdrew the $5,000.00 on deposit with the Defendant's savings and loan institution and put the money back into his personal and business account. There was no issue raised in respect to this matter; and how the making of any finding as requested by Defendant could have affected the conclusion or judgment in the case is beyond our comprehension. The Plaintiff loaned the Duvall Company $5,000.00 at the request of and upon the representations made by Defendant. The $5,000.00 was never returned and at the time the loan was made there was no possibility of repaying the money because of the hopeless insolvency of the Company. It had no assets of value except for some items of equipment which had been substantially depreciated. It was indebted not only on open account for thousands of dollars but to note holders in the approximate amount of $300,000.00; and its stock was worthless.

Appellant further asked the Court to find that money loaned to the Duvall Company was money which belonged to Plaintiff and his wife jointly. This the Court

refused to do having already found in Findings No. 3 and 5 that the money was loaned to the Duvall Company by the Plaintiff.

The last group of proposed findings submitted by Defendant related to the matter of the value of the note and security given by the Duvall Company. By its request No. 21, Defendant asked the Court to find that the shares of stock in the Duvall Company received by the Plaintiff were not without value. The Court found that "said stock was at the time of said delivery worthless and of no value." (R. 28) It, therefore, could not find that such stock did have value. To the same effect was requested Finding No. 22 where the Court was asked to find that the loan and the note given by the Duvall Company was not without value. This again the Court refused to do having found in Findings No. 7 and 8 that the Company was insolvent and unable to pay the note and that the stock was without value and that the only amount which the Plaintiff received on account of the transaction was the sum of $336.00, which was received after liquidation of the equipment, about March 6, 1958. (R. 28)

Appellant argues that the word "insolvency" is not a sufficient finding in respect to the question of the value of the note. It was not only found by the Court that the Company was and is insolvent, but also, that it was unable to pay the amount of the advance. If it was not able to pay the amount of the advance and the security given in connection therewith was worthless it is obvious

that the note was likewise worthless. No person will, if he is aware of the true facts, make a loan to an insolvent company who cannot repay the loan and take in connection therewith stock or other property of no value. It is respectfully submitted that the court did not err in refusing to making findings as requested by Appellant.

VII. ALLEGED INSUFFICIENCY ON PROOF OF DAMAGES TO THE PLAINTIFF.

Appellant claims there has been no proof of damage by Respondent in this matter. Apparently the fact that Plaintiff lost $5,000.00 as well as the benefit of the use of the money and the 500 shares of stock in the Duvall Company which was represented to be worth in excess of $14,000.00 does not seem to satisfy Defendant. The Court in its Finding No. 9 held:

> "By reason of the false and fraudulent representations made to him by the Defendant herein, Plaintiff has been damaged in the sum of $5,000.00, plus interest at the rate of 6 per cent per annum from December 21, 1952, less the amount received by Plaintiff from the liquidation of the assets of the Duvall Company in the sum of $336.00." (R. 28)

This Finding of damage is adequately supported by the evidence and no citation of authority is necessary to support the same.

However, Appellant makes the statement in his brief that it is necessary for this court to establish a theory of damages in regard to fraud cases. He then quotes the

rule which was enunciated in the case of *Hecht* v. *Metzler,* 14 Utah 408, 48 P. 37, which states that damages in a fraud action should be computed as if the case were being tried the day after the contract was entered into. There is no reason to assume that this theory was not used by the trial court in this case. Appellant then cites the Vermont case of *Crowley* v. *Goodrich,* 44 A 2d 128, and quotes from that decision the following:

> ". . . it was incumbent on the plaintiffs to allege and prove that it was *not collectible* at the time the loan was made *because of the insolvency of maker* or for any other sufficient reason." (Emphasis supplied)

Every a cursory look at the several financial statements of the Duvall Company during the period in question (Exhibits E, K, P, Q and T) will reveal that the now defunct Duvall Company was insolvent on December 21, 1952, the time when the loan was made to defendant, and could not repay any portion of the loan. Respondent has therefore fulfilled the requirement set up by the Court in the Crowley Case.

Appellant states that a casual examination of the Company's financial statement dated December 31, 1952, would disclose some "very tangible assets," yet it owed $300,000.00 on notes which were due and unpaid, plus interest thereon, and could not pay its current bills (for which latter purposes the loan was used). Approximately 10 months later these "tangible assets" were assigned to the Intermountain Association of Credit Men who liquidated the same and paid only a few of the creditors, in-

cluding Respondent, a nominal part of the amount owing. (It must be remembered that most of the note holders signed an agreement to subordinate their obligations or there would have been substantially less recovery). (See Exhibits 13 and T)

In measuring the amount of damages to be awarded, the most familiar rule applied by the courts is the so-called "benefit of the bargain" rule whereby the injured party not only gets back the amount which he has parted with, but also the benefit of any bargain which he might have otherwise obtained if the facts were as represented. Thus, in the present case, part of the inducement and consideration for making the loan being the additional transfer of shares of stock in the Duvall Company, Plaintiff would be entitled to recover not just his $5,000.00 out of pocket loss, but he should also recover a further amount equal to the reasonable value of the stock had the mine been worth what it was represented to be. See 24 Am. Jur. FRAUD AND DECEIT, Page 55, Sec. 227, where the rule is stated to be:

> "The great weight of authority sustains the general rule that a person acquiring property by virtue of a commercial transaction, who has been defrauded by false representations as to the value, quality, or condition of the property, may recover as damages in a tort action the differences between the actual value of the property at the time of making the contract and the value that it would have possessed if the representations had been true. In other words, the defrauded party is entitled to recover the difference between the real and the represented value of the property."

The Utah cases cited in support of this general rule are *Stuck* v. *Delta Land and Water Co.,* 63 Utah 495, 227 P. 791; and *Hect* v. *Metzler, supra.*

Other Utah cases which have applied the same rule are *Kinnear* v. *Prows,* 81 Utah 135, 16 P. 2d 1094, and *Pace* v. *Parrish,* 122 Utah 141, 247 P. 2d 273.

However, where the representations are not of the nature of expressing value, or where they induce the expenditure of money by way of of a loan or otherwise which would not have been made except for the misrepresentations, the courts have frequently used the rule for measuring damages generally applied in tort cases.

The following quotations are taken from 24 Am. Jur., FRAUD AND DECEIT, Sec. 217, et seq:

> "As a general rule, one injured by the commission of fraud is entitled to recover such damages in a tort action as will compensate him for the loss or injury actually sustained and place him in the same position that he would have occupied had he not been defrauded." (p. 47)

> "Under general principles as to damage, an injured party is entitled to recover in a tort action such damages as result directly, naturally, and proximately from fraud, including those which were actually or presumptively within the contemulation of the parties when the fraud was committed. The recovery is restricted in all cases to such damages as were the natural and proximate consequences of the fraud and such as can be clearly defined and ascertained." (p. 48)

As stated by this Court in the case of *Park* v. *Moorman Mfg. Company,* 121 Utah 339, 241 P. 2d 914:

> "The fundamental principle of damages is to restore the injured party to the position he would have been in had it not been for the wrong of the other party."

In the case of *U. S.* v. *Ben Grunstein and Sons Co.,* 137 Fed. Supp. 197, the court stated:

> "Indeed, if we look through the long line of cases, both Federal and State, dealing with damages in common law fraud actions, so often alluded to as conflicting, we find such conflict to be more apparent than real. Every one of them, in essence, attempts to give the person defrauded such damages as he can prove 'naturally and proximately resulted from the fraud,' . . . In cases where the person defrauded can credibly and reasonably establish that which he would have received but for the fraud, it is that which the Court gives him, less that he has already received from the fraud doer. In other cases where the evidence, as to what the person defrauded has lost due to the fraud, has been but speculative, so that he cannot credibly establish such value, then such person is remitted to what he can credibly establish he has lost, i.e., the contract price, less again the value of what he has already received." . . .

In *White* v. *Gordon,* 130 Ore. 139, 279 P. 289, the court held that the measure of damages for fraudulently procuring a loan on inadequate security was the difference between the amount of loan and the value of the security at the date of loan, with interest from that time.

We submit that the Finding on damages is adequate and that it is well supported by the evidence.

CONCLUSION

From the foregoing analysis and discussion this Court should determine that there was no error committed by the trial court. However, should there appear to be any technncal error, Respondent respectfully submits that such error would not justify or require a reversal of the Judgment. Rule 61 U.R.C.P. provides as follows:

> "No error in either the admission of the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The judgment of the trial court should be affirmed.

Respectfully submitted,

ARTHUR H. NIELSEN
NIELSEN AND CONDER
Attorneys for Respondent
510 Newhouse Building
Salt Lake City 11, Utah